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Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JONATHAN KNIGHT,

Petitioner,

v.

DAVID DRYE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two questions for review.

1. Whether the Appellate decision below presents a direct conflict with the established United States Supreme Court precedential decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) that a police officer's speech as a private citizen is never protected by the First Amendment?

(Suggested Conclusion: Yes)

2. Whether the Appellate decision below that Petitioner's citizen speech is not an activity protected under the First Amendment of the Constitution and is in direct conflict with clearly established precedent from the other appellate circuits who have considered the issue in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)?

(Suggested Conclusion: Yes)

LIST OF THE PARTIES

Petitioner:	Jonathan Knight
Respondent:	DAVID DRYE, In His Individual and His Official Capacity As Chalfont Borough Manager;
Respondent:	MARILYN BECKER, In Her Individual and In Her Official Capacity as Mayor Of Chalfont Borough;
Respondent:	GARY LUCAS, In His Official Capacity As President Chalfont Borough Council;
Respondent:	CHALFONT BOROUGH COUNCIL, In Their Official Capacities As Members of Chalfont Borough Council; CHALFONT BOROUGH;
Respondent:	FRANK CAMPBELL, In His Official Capacity As Chief of Chalfont Borough Police Department;
Respondent:	CHALFONT BOROUGH POLICE DEPARTMENT, Chalfont Borough;
Respondent:	FRATERNAL ORDER OF POLICE #53;[1]
Respondent:	POLICE BENEVOLENT ASSOCIATION, Chalfont Borough Lodge;[1]

[1] Fraternal Order of Police and the Police Benevolent Association were not Appellees in the lower court.

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OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court is reproduced at App. 1a.

The Memorandum and Order of the District Court for the Eastern District of Pennsylvania is reproduced at App. 8a.

The Order of the United States Court of Appeals for the Third Circuit denying rehearing is reproduced at App. 32a.

BASIS FOR JURISDICTION IN THIS COURT

The basis for this Court's jurisdiction for the Petitioner's Writ of Certiorari is 28 U.S.C. § 1254(1).

The decision of the appellate court was issued on April 14, 2010. The decision of the appellate court denying petition for rehearing was issued on May 10, 2010. This petition is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

42 U.S.C. §1983, First Amendment, Federal Constitution (Retaliation).

STATEMENT OF THE CASE

This case concerns the appellate court's decision affirming the district court's order in granting summary judgment in favor of respondents. The appellate court misunderstands the timeline of events leading up to the termination of Petitioner.

The pertinent facts may be summarized as follows:

In February 2005, Petitioner reported to his superiors (Becker and Campbell) and to Chalfont Borough police officers (and residents and taxpayers) that he received complaints by a member of the public (Watson) alleging that fellow officer Horn was harassing Watson at his business establishment (TLC Carwash). Becker and Campbell never conducted any investigation into the Petitioner's reports concerning Watson's allegations against Horn.

In June 2005, the Petitioner, while off-duty, witnessed theft by Chalfont Borough former Borough Manager (Drye) in a neighborhood restaurant. *See* App. 25a-26a.

Contrary to the appellate court's factual conclusion at App. 25a-26a that Petitioner did not report the Drye theft to Respondents, the material summary judgment record shows that the Petitioner reported the Drye theft to the municipal Respondents. Petitioner was identified as a witness in the business owner's formal complaint. As such, Petitioner originally engaged in citizen speech as a private citizen and is protected under the First Amendment. The record below was not

disputed on the issue: (Petitioner "*reported the Soncini complaints as a member of the public to defendants Campbell, Robert Milligan, and defendant Chalfont Borough*"). Contrary to the trial court's findings that the Petitioner "*never reported this incident*", the trial court erred by rejecting the un-rebutted facts from the Petitioner's affidavit. Both Soncini (the victim of Drye's theft) and Petitioner reported Drye's misconduct to Chalfont Borough Council before October 12, 2005 (the date of Petitioner's termination).

In its decision the trial court made crucial findings of fact that were hotly contested by the Petitioner. The trial court found it was undisputed that after talking with Watson that Petitioner knew from the "*Chief of Police and by fellow officer Milligan that Watson was subject of an ongoing narcotics investigation by the Bensalem Township Police Department.*" However in the Petitioner's affidavit and in his reply brief to Respondents' summary judgment motion, the Petitioner denied this factual assertion and disputed Respondents' claims. ("*In February 2005 . . . **unbeknownst to me** Watson was already the target of an investigation of drug dealing*".)

The trial court's factual finding that "*It is also undisputed that armed with this knowledge, Knight warned Watson that he was in trouble.*". This finding by the Court is contradicted both by the Appellant, and by Watson himself. ("*So I understand you correctly, sir, when you tell officer knight about your drug dealing, he tells you **to stop** dealing . . . right?*".) To which, Watson replied "*right.*"

Next, contrary to the appellate court's decision that the Petitioner's arbitration testimony occurred after his termination, the Petitioner adduced specific legal and factual support in the record showing that the municipal Respondents did not terminate Petitioner after the arbitration testimony, but months before his termination. *See* App. 4a and 26a. Petitioner claims that his termination was in retaliation for his protected activities of reporting wrongdoing by fellow officer Horn and former Borough Manager (Drye).

The Respondent's filed its motion for summary judgment essentially contending that the Horn complaint was not protected whatsoever. The appellate court also found as a matter of fact that the Petitioner neither reported, nor was identified as a witness in the theft by Borough Manager (Drye). Both fact findings directly conflict with Fed. R. Civ. P. 56. On March 13, 2009 the district court granted summary judgment in favor of Respondents on the grounds that Petitioner's complaints against Horn as matter of law could never be protected speech binding under the precedential decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Next, the lower court concluded that the Petitioner's Horn complaint was not protected, not because such a complaint is not within the ambit of the First Amendment. Apparently the circuit court agreed that if the Petitioner had reported, or been identified as a witness in the Drye complaint he would have stated a claim under the Frist Amendment. The clear evidence in the record that the Petitioner did report Drye's theft incident while off duty is not protected directly conflicts with the Third Circuit binding precedential

pronouncement that "citizen speech" as a matter of law is protected speech covered under *Reilly v. City of Atlantic City*, 532 F3d 216 (3d Cir. 2008). The Petitioner timely appealed to the appellate court. On April 13, 2010, the appellate court affirmed the district court's judgment. Petitioner timely filed his petition for rehearing en banc.

On May 10, 2010, the appellate court denied petitioner's request for rehearing. Petitioner now timely petitions this Honorable Court to grant this Writ of Certiorari.[2]

REASONS FOR GRANTING THE PETITION

As more fully described herein, the panel decision conflicts with decisions of the United States Supreme Court, including *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 2515 (2002), *Behrens v. Pelletier* 516 U.S. 299, 313, 116 S.Ct. 834, 842 (1996) and *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L. Ed. 2d 238 (1995) and with prior decisions of other Circuit Courts who have considered the issue of the scope of the First Amendment's protections for law enforcement officers, including *Okin v. Village of Cornwall On Hudson Police Dept.*, 577 F.3d 415, 433 (2d Cir. 2009), *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 104-05 (2d Cir. 2006), overruled on other grounds by *Appel v. Spiridon*, 531

[2] The decision below also primarily addressed a claim that was never raised by anyone on appeal. *See* App.8a-22a. The sole ground for this appeal is Petitioner's First Amendment claim. *See* Notice of Appeal.

F.3d 138, 140 (2d Cir. 2008), *Demoret v. Zegarelli*, 451 F.3d 140, 148 (2d Cir. 2006), *Munafo v. Metro. Transp. Auth.*, 285 F.3d 201, 210-11 (2d Cir. 2002); *Harman v. City of New York*, 140 F.3d 111, 120-121 (2d Cir. 1998) and *Frank v. Relin*, 1 F.3d 1317, 1330 (2d Cir. 1993) and consideration by the full court is necessary in order to secure and maintain uniformity of this Court's decisions.

The Supreme Court has expressly, and consistently, rejected the notion that such speech is not the subject of clearly established precedent under the First Amendment. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 2515 (2002). Accord *Okin v. Village of Cornwall On Hudson Police Dept.*, 577 F.3d 415, 433 (2d Cir. 2009). In *Hope v. Pelzer* and in *Okin*, the Court examined controlling precedent existing at the time the defendants acted, elucidated the principles derived from that precedent and concluded that, in light of this precedent, reasonable officials should have known their conduct violated clearly established constitutional rights. *Hope v. Pelzer*, *supra*, 536 U.S. at 741-746; *Okin*, *supra*, 577 F.3d at 433-437. The Court's summary order in this case undertakes no such analysis, but instead stops short based on its conclusion that this fact pattern has not yet been considered.

The Legal Standard for Petitioner

Pursuant to 28 U.S.C. § 1254(1), Petitioner's Writ for Certiorari should be granted because the decision from the appellate court affirming the district court's decision granting Respondent's motion for summary judgment is in direct conflict with established U.S.

Supreme Court precedent *Garcetti v. Ceballos*, 547 U.S. 410 (2006). First, pursuant to Supreme Rule 10(a) "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Reilly v. City of Atlantic City*, 532 F3d 216 (3d Cir. 2008).

Secondly, as a matter of law, because the Third Circuit's precedential decision in *Reilly v. City of Atlantic City* established that even a police officer's official duties including testifying and reporting wrongdoing and misconduct are each activities protected by the First Amendment to the Federal Constitution, the appellate court erred in disregarding the *Reilly* protections. Moreover, the *Reilly* court did not expressly limit the protections of the First Amendment only to courtroom testimony (as the court below erroneously established).

Lastly, the district court disregarded the clear boundaries under Fed. R. Civ. P. 56. The district court's summary judgment ruling conflicted with Fed. R. Civ. P. 56 because the court cited grounds for the Petitioner's firing that were not relied upon by the Respondents, and because if the district court was going to serve as the fact finder, it failed to draw factual inferences in favor of the Petitioner as required by Fed. R. Civ. P. 56.

1. ***The Appellate Court's April 14, 2010 decision is in direct conflict with the United States Supreme Court decision in Garcetti v. Ceballos, 547 U.S. 410 (2006)***

In holding that the Petitioner's reports of misconduct by fellow officers is not protected by the First Amendment, the lower court directly contradicted, and paid lip service to, the court's 2006 *Garcetti* decision. Such disputes are not resolved through Fed. R. Civ. P. 56. The lower court pronounced that *Garcetti* was a strict bar against First Amendment claims by police officers. *See* App. 8a-11a. This judicially created immunity was not the intent, or the lesson, of the *Garcetti* ruling.

Controlling case law, even pre-Garcetti, demonstrates that the precedent that employee speech, even if made outside of the chain of command, in violation of an official duty, was protected by the First Amendment. In *Frank v. Relin*, 1 F.3d 1317, 1330 (2d Cir. 1993), In *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 104 05 (2d Cir. 2006), overruled on other grounds by *Appel v. Spiridon*, 531 F.3d 138, 140 (2d Cir. 2008), Plaintiff Skehan spoke up about "misfeasance within the police department and allegations of an ongoing cover up." *Id.* Skehan intentionally violated the "normal chain of command" in speaking out, based on his concern that the incidents would be covered up if he utilized that chain. 46 F.3d at 102. On appeal, this Court reversed the trial court's grant of summary judgment on qualified immunity, holding that plaintiff's First Amendment rights were "clearly established by 2002 and 2003, the period of time where [defendant] allegedly retaliated

against the plaintiffs." *Id.* at 107. And in *Harman v. City of New York*, 140 F.3d 111, 120 -121 (2d Cir. 1998), this Court recognized that government employees "possess interests, as citizens, in being able to comment on matters of public concern" even when those matters encompass the operations of the agency that employs them. To protect those interests, the court struck down a City policy which required employees to seek and obtain permission from the City before speaking to the press, finding that preclearance requirement to constitute an impermissible prior restraint, violative of the First Amendment. *Id.* at 124. Thus, the precedent the lower court was obliged to follow has been clear since at least 1998. These precedents, which comprise just a few of the many cases affording protection to employee speech outside the chain of command, or uttered in violation of employer policies, were not altered in any way by the ruling in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." 547 U.S. at 421, 126 S. Ct. at 1960. Indeed, Garcetti expressly addressed the "chain of command" issue in emphasizing the narrow scope of its ruling.

The Ninth Circuit decision in *Garcetti*, which rejected the claim ultimately accepted by the United States Supreme Court, reasoned that:

> The proposed per se rule would be particularly detrimental to whistle-blowers, such as *Ceballos*, who report official misconduct up the chain of command, because all public

> employees have a duty to notify their supervisors about any wrongful conduct of which they become aware. To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.

Ceballos v. Garcetti, 361 F.3d 1168, 1176 (9th Cir. 2004) (emphasis added). In dismissing this concern, the Supreme Court said:

> "The Court of Appeals' concern . . . is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering v. Board of Ed.*, 391 U.S. 563, 572, 88 S.Ct. 1731, 1737 (1968)] and *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983) that are made outside the duties of employment."

Under the Supreme Court precedential decision in *Garcetti*, there was sufficient evidence adduced by Petitioner to create a genuine issue of material fact that the Petitioner's protected activities (i.e., the Watson/

Horn complaints) were protected duties covered under *Garcetti*.[3] *See* App. 25a-26a.

As stated, the Petitioner only appealed as to the municipal Respondents. The appellate court also addressed an issue not raised by Petitioner (or the other parties) of a "duty of fair representation" claim. *See* App. 15a-22a.

Given the sole reason relied upon by Respondents in its summary judgment argument, the lower court ignored precedent by approving the trial court's improper factual inferences drawing in favor of the moving party in resolving disputed facts on behalf of the non-moving party.

2. ***The Appellate Court's decision affirming summary judgment on Petitioner's First Amendment claim conflict with the precedent from the same circuit Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008).***

The appellate court also ignored its own Third Circuit precedential decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) extended the protection of the First Amendment to both testifying in court and to a police officer's "citizen speech". While not clear, the court below apparently created a new role of law that law enforcement officers are always "on duty". The court rejected the *Reilly* ruling that "citizen speech" is still

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[3] The trial court's summary judgment ruling must also be reversed because it cited grounds for Petitioner's firing that were not relied upon by the Respondents.

protected, even when made by a person employed by a police department.

In Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) the same circuit held that a police officer's truthful testimony constituted "citizen speech" protected by the First Amendment (even though the testimony was given pursuant to his official duties).

The *Reilly* court reemphasized the important societal interests served by recognizing an exception to *Garcetti* affording constitutional protection for employee speech in court: "when a government employee testifies truthfully, s/he is not 'simply performing his or her job duties,' *Garcetti*, 547 U.S. 423 (2006). Again, the lower court simply excluded consideration of the arbitration testimony as a basis for a First Amendment claim. *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006).

3. *The Lower Court Decision Ignored Summary Judgment Precedent Established Since Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986).*

Pursuant to Fed. R. Civ. P. 56(b), if the district court was going to act as the fact finder about the nature of the Petitioner's duties, it was obliged to draw all factual inferences in favor of the Petitioner. *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009) (police commander claims he was terminated in retaliation for releasing to the media an internal memorandum outlining concerns about

police department's handling of incident). The circuit court ignored *Garcetti's* holding that whether that memo was written was part of his official duties under *Garcetti* is a disputed issue of material fact that could not be decided on motion to dismiss. The Respondents never argued that the Horn or Drye complaints did not involve a matter of public concern under *Connick v. Myers*, 461 U.S. 138, 146 (1983).

Given this posture, the appellate court was required to accept that the Petitioner made the "Drye complaint" as a citizen (as the undisputed records reflected) and that *Garcetti* should not have barred the Petitioner's First Amendment claim. Or the court was required to find that the Petitioner had in fact reported the Drye complaint to Respondents and that *Reilly* applied.

Lastly, the appellate court decision ignores the applicable burden established by clear precedent. The burden of establishing a prima facie case is not onerous. *Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248, 253 (1981). To grant a motion for summary judgment in the face of obvious conflicts of fact is inconsistent with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L. Ed. 2d 407 (1993), *Sheridan v. E.I.Dupont de Nemours & Co.* 100 F.3d 1061, 1071 (3d Cir. 1996), citing *Hicks* at 509 U.S. 511. 'We construe all facts and inferences in favor of Appellant.' As a matter of law, Petitioner has shown genuine issues of material facts. In undertaking the requisite analysis, other same circuit has held in that plaintiff's conduct and expression in an internal investigation of other officers was a matter of public concern. *Baldassare v. New Jersey*, 250 F.3d 188, 195-97 (3d Cir. 2001). The court below did not acknowledge the precedential *Baldassare* decision from the same circuit.

The appellate court's decision directly conflicts with the applicable standards by adopting the district court's factual findings regarding the Drye complaint when it determined that despite Petitioner being identified as a private citizen and as a witness, he nonetheless was engaged in his official duties, and not engaged in "citizen speech."

The very fact that the appellate panel weighed evidence and the Petitioner's facts about perceived discrepancies between the reports of wrongdoing indicates that the judge was weighing evidence and resolving conflicts in the summary judgment evidence, and failing to give the plaintiff the benefit of all favorable inferences that could be drawn. *See, e.g., Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005) (noting that a district court cannot make credibility determinations or weigh the evidence when deciding a summary judgment motion);

The opinion below ignored other material portions of the record that the Petitioner clearly cited. The circuit panel did not address the un-rebutted facts that Petitioner had also reported Horn for additional acts of misconduct directly to Respondent Becker. (*"Officer Horn neglected his duties, failed to patrol his beat, and disobeyed a direct order."*). Because each of these Horn acts of misconduct are dual violations of the Chalfont Civil Service Code and the Police Duty Manual, a jury could reasonable reject the Respondent's proferred contention that their real reason for firing Knight were violations of the municipal codes and regulations. In *Fierro v. City of New York*, 591 F.Supp.2d 431 (S.D.N.Y. 2008) the court held that plaintiff's speech was spoken

as a "citizen", not public sector performing official duties, as required to state a First Amendment retaliation claim under § 1983 in the workplace.

The court misunderstood, and misapplied, the legal standards under Fed. R. Civ. P. 56 the law for determining summary judgment when the trial court cited grounds for the Petitioner's firing that were not relied upon by the Respondents. The lower court failed to draw all the required reasonable inferences from the record in Petitioner's favor that support finding that he had presented cognizable retaliation claims. Under Fed. R. Civ. P. 56(b), the lower court should not serve as the fact finder. The district court inserted itself as the fact finder and failed to draw factual inferences in favor of the Petitioner in the retaliation clams. The panel's decision approved, and adopted, a new (and confusing) summary judgment standard. The district court relied upon evidence that was disputed in finding that the Respondents did not act with retaliatory animus. This ruling clearly conflicts with the burdens of proof from *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

Lastly, the panel's decision also conflicts with summary judgment standards followed from other circuits. Petitioner was entitled to have his case heard by the jury. *See Valentino v. Village Of South Chicago Heights*, __ F.3d __, 2009 WL 2253406 (7th Cir. July 30, 2009). Under clearly established burdens of proof is a retaliatory animus clause. A plaintiff can show pretext by revealing such weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the

employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Green v. New Mexico*, 420 F.3d 1189, 1192-93 (10th Cir. 2005). The panel's decision changed the legal applicable standards. If the lower court was going to usurp the jury's role, it failed to draw factual inferences in favor of the Petitioner as required by Rule 56(B). *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 652 (5th Cir. 1999) (noting that the parties presented "a factual dispute which must be resolved by the ultimate fact finder, not by the judge on summary judgment"). (To show pretext, the Petitioner must only call into question the honesty or good faith the employer's asserted reasons for its employment action.) *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999), abrogated on other grounds by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L. Ed. 2d 106 (2002).

Although stating it was required to draw factual inferences in favor of the Petitioner, the court apparently sought out, and included, testimony from a grand jury proceeding against the Petitioner as the grounds for his termination. (The Respondent's termination notice to the Petitioner did not cite, reference, or mention the grand jury proceeding as the reason for Petitioner's discharge). It is unknown where the lower court obtained this erroneous information.[4]

[4] The reasons given by the Respondents do not mention the Petitioner's grand jury testimony, or that Respondents did offer this testimony. If the court was going to rely upon court testimony then this petition should be granted because the Petitioner was clearly then protected by *Reilly's* admonition that testifying is clearly activity protected by the First Amendment.

The trial court's finding that *"based upon these tips from an undercover informant"* an inquiry was begun. However, both Respondents Becker and Campbell flatly rebut this finding by the Court. Respondents Becker and Campbell flatly confess that no investigation whatsoever was ever undertaken by them, and that Becker and Campbell *"deferred to the criminal process.* The Respondent's testimony creates a genuine issue of fact regarding the Respondent's motivations.[5]

CONCLUSION

Because the lower court's decision directly conflicts with: i.) a binding decision by the highest court; ii.) Conflicts with other precedent from the same circuit; and iii.) Conflicts with summary judgment standards from *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Respondent Becker then testifies that rather than *deferring to the criminal process*, it played no role in her determination. Becker's decision to terminate the Petitioner was *not* based upon the criminal charges against him. (*"my decision to terminate was not based upon the criminal charges."*).

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 26, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2012

JONATHAN KNIGHT,

Appellant,

v.

DAVID DRYE, In His Individual and His Official Capacity As Chalfont Borough Manager; MARILYN BECKER, In Her Individual and In Her Official Capacity as Mayor Of Chalfont Borough; GARY LUCAS, In His Official Capacity As President Chalfont Borough Council; CHALFONT BOROUGH COUNCIL, In Their Official Capacities As Members of Chalfont Borough Council; CHALFONT BOROUGH; CHIEF POLICE FRANK CAMPBELL, In His Official Capacity As Chief Of Chalfont Borough Police Department; POLICE BENEVOLENT ASSOCIATION, Chalfont Borough Lodge; CHALFONT BOROUGH POLICE DEPARTMENT, Chalfont Borough; FRATERNAL ORDER OF POL LODGE # 53

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 07-cv-03097)
District Judge: Honorable Eduardo C. Robreno

Appendix A

Submitted Under Third Circuit LAR 34.1(a)
January 26, 2010

Before: FUENTES, FISHER, *Circuit Judges*;
and KANE,* *Chief District Judge.*

(Filed: April 14, 2010)

OPINION OF THE COURT

KANE, *Chief District Judge.*

Jonathan Knight appeals from an order of the District Court granting summary judgment to the Appellees. *See Knight v. Drye*, No. 07-3097, 2009 U.S. Dist. LEXIS 21532 (E.D. Pa. Mar. 13, 2009). Knight's amended complaint asserted thirteen causes of action based on his termination from his position as a police officer because he allegedly disclosed confidential information concerning an undercover narcotics investigation. On appeal, Knight challenges only the dismissal of his claim based on 42 U.S.C. § 1983 for First Amendment retaliation. We will affirm.

I.

We write exclusively for the parties, who are familiar with the factual context and legal history of this case.

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* Honorable Yvette Kane, Chief Judge of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

Therefore, we will set forth only those facts necessary to our analysis.

On February 12, 1999, Knight began his employment as a police officer for Chalfont Borough. After joining the police force, Knight developed a casual friendship with Whitney Watson, IV, the manager of a local car wash. In 2005, Watson was under investigation by the Bensalem Township Police Department for his participation in drug dealing. In January 2005, Watson contacted Knight. Knight alleges that Watson "complained about harassment by fellow Officer Clifford Horn." (Appellant's Br. at 6.) Knight maintains that after being contacted by Watson, he promptly took the complaint to Officer Robert Milligan and to Police Chief Frank Campbell. (*Id.*) At that time, Milligan and Campbell informed Knight that Watson was under investigation.

On September 23, 2005, after being tipped by an undercover informant that Knight had given information about the investigation to Watson, the Chalfont Borough Council placed Knight on a temporary paid leave of absence. On September 27, 2005, Knight was arrested and charged with obstructing the administration of law or governmental function and hindering prosecution. That same day, he was suspended by the Chalfont Borough Council without pay. On October 11, 2005, Knight was terminated from his position as a police officer.

In June 2005, in the period between Knight's contact with Watson and his termination, Knight was involved as a witness of an incident at a local pub. According to Knight, while he was off duty, he witnessed David Drye, Chalfont Borough manager, steal beer from behind the bar and distribute it to other customers. An argument arose between Drye and the pub owner. Knight attempted to break up the fight that ensued. However, he was not involved in the later official investigation of the altercation.

II.

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.We review a District Court's order granting summary judgment de novo, applying the same standard as the District Court. *Alcoa, Inc. v. United States*, 509 F.3d 173, 175 (3d Cir. 2007). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232, 43 V.I. 361 (3d Cir. 2001).

III.

The District Court entered summary judgment for Appellees. On appeal, Knight claims that there were genuine issues of material fact regarding his First Amendment retaliation claim that should have precluded summary judgment. Knight contends that he was fired for engaging in two specific instances of

protected conduct. First, Knight cites his report to Police Chief Campbell and Officer Milligan alleging misconduct by Officer Horn. Second, Knight cites the potentially criminal conduct by Drye that Knight witnessed when he was off-duty.[1]

"To state a First Amendment retaliation claim, a public employee plaintiff must allege that his activity is protected by the First Amendment, and that the protected activity was a substantial factor in the alleged retaliatory action." *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009) (citing *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006)). "'The first factor is a question of law; the second factor is a question of fact.'" *Id.* (quoting *Hill*, 455 F.3d at 241).

> A public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made.

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1. In his appeal, Knight also raises a claim that he was terminated for testifying before a grand jury, which was empaneled to investigate his own criminal conduct. This claim was not raised before the District Court and, as a result, is waived on appeal. *See Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005); *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991).

Hill, 455 F.3d at 241-42 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)).

We find that the District Court was correct in dismissing both of Knight's First Amendment claims as insufficient to withstand summary judgment. First, Knight's complaint up the chain of command to Officer Milligan and Police Chief Campbell is not speech protected by the First Amendment. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. Although Knight argues that his report should be protected by the Third Circuit's recent pronouncement in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), his reliance on that case is misplaced. In Reilly, we found that the truthful testimony by a police officer in court constituted "citizen speech" and was therefore precluded from the "official duties" doctrine set forth in *Garcetti*. *Reilly*, 532 F.3d at 231. However, Knight's out-of-court statements to his superiors do not fall into this category. Therefore, the District Court was correct in finding that Knight failed to establish a First Amendment violation based on his reporting of any misconduct by Officer Horn.

Second, Knight argues that his observation of the conduct of Manager David Drye was a motivation for his firing, and that his retaliation claim should therefore have been allowed to proceed. Again, the District Court

properly found that Knight failed to point to record evidence that he ever reported Drye's conduct. Absent such a report, the District Court was correct in finding that Knight could not support a First Amendment retaliation claim.

We agree with the District Court's conclusion that no genuine issue of fact remained. Appellees were therefore entitled to summary judgment on the First Amendment retaliation claim.

Additionally, Knight argues that the District Court erred by citing grounds for his firing that were not relied upon by Appellees and by failing to draw factual inferences in his favor. Essentially, Knight argues that "a jury would be left with questions about the real reasons Appellee offered for firing" him. (Appellant's Br. at 28.) However, Knight misses the point. Whatever the motivations were for his firing, he has failed to establish that they were the result of the exercise of his First Amendment rights. Therefore, his First Amendment retaliation claim was properly dismissed.

IV.

For the foregoing reasons, we will affirm the order of the District Court.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 18, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 07-3097

JONATHAN KNIGHT,

Plaintiff

v.

DAVID DRYE et al.,

Defendants.

MEMORANDUM

EDUARDO C. ROBRENO, J. MARCH 13, 2009

Plaintiff Jonathan Knight ("Knight"), a former police officer in Chalfont Borough, Bucks County, Pennsylvania, initiated this lawsuit after he was terminated for allegedly leaking confidential information about an undercover narcotics investigation to a local drug dealer. Knight sued Chalfont Borough and certain

individual defendants,[1] ("Chalfont Borough Defendants"), the Chalfont Borough Council, the Chalfont Borough Police Department, the Police Benevolent Association ("PBA"), and the Fraternal Order of Police ("FOP"), asserting thirteen causes of action in his amended complaint, for various constitutional, statutory, and state common law violations.

During the course of this litigation, Knight's claims have been narrowed considerably, as have the pool of Defendants.[2] Knight's remaining claims are limited to a claim under 42 U.S.C. § 1983 ("Section 1983") for First Amendment retaliation against the Chalfont Borough

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1. The individual defendants are Marilyn Becker, Mayor of Chalfont Borough; Frank Campbell, Chalfont Borough's Police Chief; David Drye, the former Manager of Chalfont Borough; and Gary Lucas, President of Chalfont Borough's town council. Knight's claims against these defendants in their official capacities were dismissed by the Court on January 4, 2008. (*See* 1/4/08 order, doc. no. 36.)

2. On January 4, 2008, the Court dismissed Counts II, III, V, VI, IX, X, XI, and XII of Knight's amended complaint. (*See* 1/4/08 order, doc. no. 36.) The Court also dismissed Knight's claims against the Chalfont Borough Council and the Chalfont Borough Police Department, in their entirety. (*Id.*) On February 19, 2009, the Court dismissed Counts IV and VII of the amended complaint, with prejudice. (*See* 2/19/09 order, doc. no. 71.) Also, to the extent Count VIII of the amended complaint averred an Equal Protection class-of-one claim, the Court dismissed Count VIII, with prejudice. (*Id.*) Finally, on February 19, 2009, the Court granted the FOP's motion for summary judgment on all of Knight's claims against it. (*See* 2/19/09 order, doc. no. 70.)

Defendants and a claim for breach of contract against the PBA. Before the Court are the PBA's and the Chalfont Borough Defendants' respective motions for summary judgment. For the reasons that follow, these motions will be granted.

I. BACKGROUND[3]

Knight was employed by Chalfont Borough as a police officer from February 12, 1999 to October 11, 2005. During this time, he developed a casual friendship with the manager of a local car wash, Whitney Watson, IV.[4] In January 2005, Watson approached Knight and informed him that he had "screwed up" by selling four ounces of marijuana to an undercover agent. Following this conversation with Watson, it is undisputed that Knight was informed by the Chief of Police and by a fellow officer, Robert Milligan, that Watson was the subject of an ongoing narcotics investigation by the Bensalem Township Police Department. It is also undisputed that, armed with this knowledge, Knight warned Watson that he was "in trouble."[5] After receiving

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3. In considering the instant motions, the Court relied on either uncontested facts or, if the facts were disputed, viewed the facts in the light most favorable to Knight.

4. The parties dispute the closeness of Knight's relationship with Watson. For the purposes of the instant motions, the Court credits Knight's claim that Watson was merely his acquaintance.

5. *See* Defs.' Mot. for Summ. J. Ex. 9, doc. no. 53, Knight Grand Jury Testimony 70:22-70:23. Defendants contend that (Cont'd)

Knight's warning, Watson avoided contact with the undercover agent and the investigation into his drug activity stalled. Shortly thereafter, based on tips from an undercover informant, the police began an inquiry into Knight's role in the Watson investigation.

On September 23, 2005, the Chalfont Borough Council placed Knight on a temporary paid leave of absence, pending the criminal investigation into his behavior. On September 27, 2005, Knight was arrested and charged with obstructing the administration of law or governmental function and hindering prosecution. That same day, the Chalfont Borough Council suspended Knight without pay. On October 11, 2005, the Chalfont Borough Council unanimously voted to terminate Knight's employment. The Chalfont Borough Council based this decision on its belief that Knight's conduct violated specific provisions of Chalfont Borough's police duty manual and civil service regulations.[6] Knight was

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(Cont'd)

Knight's initial warning to Watson was actually much more specific - that Knight advised Watson on how to behave if he was contacted by the undercover agent again and then, several days later, confirmed to Watson that he was the subject of an ongoing narcotics investigation. Defendants allege that, after relaying this information to Watson, Knight attempted to conceal his involvement by instructing Watson to lie to investigators if pressed about his conversations with Knight. Again, the Court will adopt Knight's version of the facts.

6. Specifically, Defendants maintain that Knight violated Section 8.10 of the Chalfont Borough Police Duty Manual, which

(Cont'd)

acquitted of the criminal charges against him, but his termination was upheld in an arbitration decision dated November 19, 2007. (Defs.' Mot. for Summ. J. Ex. 2, doc. no. 53).[7]

For the purposes of these motions, the Court will accept Knight's additional contentions, that prior to his

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(Cont'd)
states that "Members and employees shall not reveal police information outside the department except as provided elsewhere in this Manual or as required by law or competent authority. Specifically, information contained within police records, other information ordinarily accessible only to members and employees, and names of informants, complainants, witnesses confidential. Silence shall be employed to safeguard confidential information. Violation of the security of this type of information reflects gross misconduct." (Defs.' Mot. for Summ. J. Ex. 6, doc. no. 53.)

Defendants also maintain that Knight violated Section 6.1(A)(2) of the Chalfont Borough Civil Service Regulations, which states that "No person appointed to a position in the police department pursuant to these Rules may be suspended without pay or removed and no person promoted in rank pursuant to these Rules may be reduced in rank except for the following reasons . . . neglect or violation of any official duty . . . . (*Id.* Ex. 5.)

7. During the grievance and arbitration proceedings that followed Knight's termination, he was represented by a PBA lawyer, Sean Welby, Esq. The parties dispute the facts that ultimately caused Mr. Welby to withdraw from the case, but do not dispute that he did, in fact, withdraw from his representation of Knight prior to the merits portion of the arbitration hearing.

termination, he made what he now refers to as the "Horn complaint" to the Chief of Police. Specifically, based on a conversation he had with Watson in mid-February 2005, Knight reported to the Chief of Police that Officer Clifford Horn was "harassing" Watson and his employees.[8] Knight was told that the Chief would "handle" the matter. (Pl.'s Aff. ¶¶ 42, 46, 48, doc. no. 63; Pl.'s Dep. 86, 93-94.)

Additionally, before Knight was terminated, he was involved in what he now refers to as the "Drye incident." Specifically, in June 2005, Knight was off duty and patronizing a local bar and restaurant - Soncini's Pub.

8. It is worth noting that while Knight characterizes Officer Horn's behavior as "harassment" of Watson and "intentional interference with an ongoing investigation," Defendants explain that Officer Horn was conducting an independent investigation into Watson's drug activities, which ceased upon his learning that the Bensalem narcotics task force was also investigating Watson.

Moreover, the exact nature of the "improper conduct" reported by Knight remains unclear. From the record, it appears that the "harassment" Knight complained of consisted of Officer Horn issuing a vehicle citation to one of Watson's employees, who had performed a "burnout" with a vehicle in a private parking lot, and perhaps making general inquiries into possible drug activity at the car wash. (2/19/09 Hr'g Tr. 9:13-9:17.)

Although Knight testified that Watson also mentioned more egregious misconduct by Officer Horn (i.e. that he spied on Watson while wearing camouflage), Knight admitted that he never mentioned these allegations to anyone in his chain of command. (Pl.'s Dep. 93-94.)

Knight witnessed the former manager of Chalfont Borough, David Drye, steal beer from behind the bar and distribute it to other patrons. After a heated exchange between Matthew Soncini, the pub's owner, and David Drye, Officer Robert Milligan was called to the scene. According to Knight, he was not involved in the official investigation that followed, but he did attempt to break up the fight between Soncini and Drye before the police arrived.

II. LEGAL STANDARD

A. *Motion for Summary Judgment under Rule 56*

A court may grant summary judgment when "the pleadings, the discovery and the disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. *Id.* at 248-49. "In considering the evidence, the court should draw all reasonable inferences against the moving party." *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007). However, while the moving party bears the initial burden of showing the absence of a genuine issue of material fact, the nonmoving party "may not rely merely on allegations

or denials in its own pleading; rather its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

B. *Section 1983*

Section 1983 of Title 42 of the United States Code provides a cause of action for an individual whose constitutional or federal rights are violated by those acting under color of state law.[9] *See generally Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (recognizing that Section 1983 provides a remedy for violations of individual rights "secured by the Constitution and laws" of the United States).

III. DISCUSSION

A. *The PBA'S Motion for Summary Judgment*

Count XIII of Knight's amended complaint contains a breach of contract claim against the PBA, which the parties have construed as alleging a breach of the duty

9. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

of fair representation under Pennsylvania common law. (*See* PBA's Mot. for Summ. J. at 15, doc. no. 51.) Specifically, Knight alleges that the PBA (1) improperly terminated his union membership; and (2) breached its duty of fair representation to him. Also, Knight seeks the return of certain firearms that were seized from him.

The only remaining issue is whether the PBA breached its duty of fair representation to Knight.[10] "When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty . . . to represent all members fairly." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). To constitute a breach of its duty of fair representation, the PBA's conduct must be "arbitrary, discriminatory, or in bad faith." *Id.* at 44. These standards are not easily met. Rather, "[a] union's actions are arbitrary only if 'in light of the factual and legal landscape' they are 'so far outside the range of reasonableness as to be irrational.'" *Albright v. Virtue*, 320 F. Supp. 2d 276, 283 (M.D. Pa. 2003) (quoting *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991)); *see also*

10. During his deposition, Knight clarified that his allegation of improper termination from "the union" applied only to the FOP, which is no longer a Defendant in this case. (Pl.'s Dep. 176.) Knight also acknowledged that the firearms at issue were seized by the Bucks County District Attorney's office and supposedly returned to him via courier on or around September 9, 2006. Although Knight maintains that he has not received the firearms and has no knowledge of their whereabouts, he does not suggest that the PBA possesses the firearms. (*Id.* 212-213.)

Appendix B

Gearhart v. Am. Fed'n of State, County & Mun. Employees, No. 72 M.D.1998, 2004 WL 1293261, *3 (Pa. Cmwlth. Apr. 7, 2004) ("A breach of duty of fair representation is established where bad faith on the part of the union is shown.") Moreover, "[p]oor judgment on the part of the union, even that which rises to the level of negligence, is insufficient to support a claim of unfair representation." *Albright*, 320 F. Supp. 2d at 283 (citing *Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970)).[11]

In his amended complaint, Knight avers that "the union, after agreeing to represent the plaintiff, terminated the representation of him in such a period of time that deny [sic] and prejudices his rights to fair representation." (Compl. ¶ 209, doc. no. 14.) Knight argues that this was an "irrational . . . change in strategy," (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 7, doc. no. 61), which occurred "on the eve of trial" and that was tantamount to "blackmail." (2/19/09 Hr'g Tr. 39:8, 39:11.)

The PBA maintains that its decision to discontinue payment for Knight's legal representation was neither arbitrary, discriminatory, nor in bad faith. Rather, the

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11. Although there does not appear to be a Pennsylvania Supreme Court case explicitly adopting federal jurisprudence with respect to duty of fair representation cases in the context of public employment, the parties here do not dispute that Pennsylvania state courts apply the federal "arbitrary, discriminatory, or in bad faith" standard to these claims. (*See* 2/19/09 Hr'g Tr. 24:13-26:11 (discussing legal standard).)

PBA argues that its decision was consistent with its fiduciary obligations to Knight and to other union members. Specifically, the PBA notes that it retained Sean Welby, Esq., to represent Knight during his initial termination grievance proceedings. When the parties failed to reach a resolution, Knight's grievance was submitted to arbitration. Mr. Welby continued to represent Knight, successfully navigating a one-day hearing to overcome Chalfont Borough's challenge to the arbitrability of Knight's grievance. Shortly thereafter, before a hearing on the merits, Chalfont Borough offered to settle with Knight on favorable terms - i.e. reinstatement of his position as a Chalfont Borough police officer, full back pay, full seniority, and full benefits - in exchange for a release from future lawsuits. (*See* 2/19/09 Hr'g Tr. 18:8-19:8.) On the advice of his privately retained attorney, Brian Wiley, Esq., Knight declined to accept Chalfont Borough's settlement offer. [12] (*See* PBA's Mot. for Summ. J. at 5-7, doc. no. 51.) Mr. Wiley represented Knight during the merits portion of the arbitration hearing, which he lost. There was no appeal. (*Id.* at 12.)

The PBA notes that it informed Knight in advance that his decision to reject Chalfont Borough's settlement offer would result in Mr. Welby's withdrawal from the case because "[t]he offer from the Borough to reinstate

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12. During his deposition, Knight explained that he could not afford to take the settlement offer because of the substantial legal fees he already owed Mr. Wiley and because it would have required him to give up any future civil suit against Chalfont Borough. (Pl.'s Dep. 169-170.)

Plaintiff to full duty with back pay and no loss of seniority was the equivalent of the PBA having won the case; there was no other benefit that the PBA could have obtained for Plaintiff while remaining within the parameters of its fiduciary responsibility to all members of the union, who have a right not to have their resources diminished pursuing the purely personal goals of one member." (*Id.* at 17-18; 2/19/09 Hr'g Tr. 19:17-20:10 (noting that the arbitrator could not have awarded Knight punitive damages, or damages for any First Amendment violations)). *See Bazarte*, 429 F.2d at 871 ("[C]ollective bargaining representatives . . . are required to serve the interest of all members without hostility or discrimination toward any . . . .")

Knight does not substantively dispute the PBA's version of the facts and relies only on his own affidavit to support his claim that Mr. Welby's withdrawal from his representation was somehow "irrational." (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 7, doc. no. 61.) Indeed, there appears to be no other record evidence to support that the PBA acted in bad faith or in a way that was arbitrary or discriminatory. Rather, the record supports that the PBA faithfully represented Knight until he decided to reject a favorable settlement offer to preserve his private law suit.[13] Thus, to the extent that

13. Moreover, even after Mr. Welby withdrew as Knight's counsel, the PBA offered to provide Knight with a union representative during the merits portion of the arbitration, and paid the union's full share of the approximately $11,000 arbitration bill. (PBA's Mot. for Summ. J. at 18, doc. no. 51; 2/19/09 Hr'g Tr. 26:19-27:5.)

Knight's claim against the PBA is based on Mr. Welby's withdrawal as counsel during the arbitration proceedings, the PBA is entitled to summary judgment. *See Smiley v. Daimler Chrysler and UAW Local 1183*, 589 F. Supp. 2d 471, 488 (D. Del. 2008) (granting summary judgment for defendant on plaintiff's breach of the duty of fair representation claim where defendant union refused to submit plaintiff's grievance to arbitration because plaintiff rejected offer of reinstatement).

Alternatively, Knight argues that the PBA's conduct in two other instances constituted a breach of its duty of fair representation.[14] First, Knight suggests that, prior to his final termination on October 11, 2005, the PBA breached its duty of fair representation by withholding "crucial evidence" from the Chalfont Borough Council, which, if disclosed, would have resulted in his reinstatement. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 6, doc. no. 61.) While not entirely clear, it appears that Knight is suggesting that had the PBA informed the Chalfont Borough Council of his internal complaint against Officer Horn, he never would have

14. These two additional allegations are not in Knight's amended complaint but were relied upon by Plaintiff's counsel during oral argument. Also, in his response to the PBA's motion for summary judgment, Knight argued that the PBA "intentionally misled" him regarding his right to "fight for his job" using a Section 1983 action and his right to non-arbitration damages. (*See* Pl.'s Resp. to Def.'s Mot. for Summ. J. at 6, doc. no. 61.) Because this claim is not in the amended complaint and was not addressed by the parties during oral argument, the Court will not consider it here.

been terminated. (*Id.* (arguing that "similarly situated Officer Clifford Horn . . . committed more serious infractions than Plaintiff").) Second, Knight suggests that the arbitration testimony of the PBA's president, Officer Robert Milligan, somehow constituted a breach of the union's duty of fair representation. (*See* 2/19/09 Hr'g Tr. 53:16-54:17 (suggesting that Officer Milligan withheld "exculpatory information that . . . would have prevented Officer Knight's termination").)

These facts, even viewed in the light most favorable to Knight, cannot constitute a breach of the PBA's duty of fair representation. First, regardless of the PBA's conduct prior to Knight's October 11, 2005 termination, the PBA took the matter to arbitration on behalf of Knight. *See Maskin v. United Steel Workers of Am.*, 136 F. Supp. 2d 375, 381 (W.D. Pa. 2000) ("A cause of action for the breach of the duty of fair representation accrues at the point where the grievance procedure has been exhausted or otherwise breaks down to the employee's disadvantage.") Therefore, there was no harm to Knight for the alleged breach by the PBA.

Second, Knight's allegations of impropriety by Officer Milligan are vague, and cannot be confirmed by the record. To that effect, Knight relies primarily on his own affidavit in support of his claims and, to the extent that he relies on other record evidence, it does not clearly support his position. For example, Knight suggested that Officer Robert Milligan, his "union competitor," retaliated against him after Knight's successful election as a union officer by attempting to

have him arrested. (Pl.'s Aff. ¶ 13, doc. no. 63.) However, the only support Knight offers for Milligan's alleged "retaliatory animus" is Milligan's position as president of the PBA, a position once held by Knight. (*See, e.g.*, Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 28, Milligan Dep. 15:13-15:18 ("Q: At one time Officer Knight was the president of the PBA? / A: Correct. / Q: You're the president of the PBA now? / A: Correct").)

Under these circumstances, Knight has failed to show the existence of a genuine issue of material fact. *See Maskin*, 136 F. Supp. 2d at 382 (finding plaintiff's "insinuation" of hostility on the part of a union representative insufficient to establish a breach of the duty of fair representation because "[t]he finding of animosity on the part of a union representative alone does not constitute a breach of the duty of fair representation").[15] Thus, the PBA is entitled to summary judgment on Count XIII of Knight's amended complaint.

B. *The Chalfont Borough Defendants' Motion for Summary Judgment*

Count I of Knight's amended complaint contains a Section 1983 First Amendment retaliation claim against the Chalfont Borough Defendants. Knight avers that

15. Further, the Court notes that the Chalfont Borough PBA consists of approximately "four or five" police officers. (2/19/09 Hr'g Tr. 21:14-21:15.) Given the limited number of union members, the fact that both Knight and Officer Milligan held the position of president at some point is even less suspect.

he engaged in protected activity by (1) reporting Officer Horn's alleged interference in the Watson drug investigation; and (2) reporting the alleged "wrongdoing" of Defendant David Drye. (Compl. ¶ 123, doc. no. 14.) Knight claims that the Chalfont Borough Defendants terminated him in retaliation for this protected speech. (*Id.* ¶ 132.)

The Court's analysis of Knight's First Amendment retaliation claim is governed by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and related Third Circuit jurisprudence. The *Garcetti* court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[16] *Id.* at 421. Following *Garcetti*, the Third Circuit has held that "[a] public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made . . . ." *Reilly v. City of Atlantic City*, 532 F.3d 216, 228 (3d Cir. 2008) (quoting *Hill v. Borough of Kutztown*, 455 F.3d 225, 241-42 (3d Cir. 2006)).

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16. In so holding, the *Garcetti* court refined the First Amendment analysis set forth in *Pickering v. Board of Ed. of Twp. High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968).

Appendix B

Under *Garcetti* and its progeny, the threshold question is whether Knight's reports of alleged misconduct by Officer Horn or David Drye were made in his capacity as a private citizen, or pursuant to his official duties as a police officer. *See Foraker v. Chaffinch*, 501 F.3d 231, 243 (3d Cir. 2007) ("Because we agree with the District Court that [plaintiff state troopers] were acting pursuant to their job duties when they made their complaints up the chain of command . . . we need not examine whether their speech passes the remainder of the test . . . ."); *see also id.* ("'Garcetti requires that before analyzing whether an employee's speech is of public concern, a court must determine whether the employee was speaking 'as a citizen' or, by contrast, pursuant to his duties as a public employee.'" (quoting *Sigsworth v. City of Aurora*, 487 F.3d 506, 509-10 (7th Cir. 2007))). Moreover, "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law." *Foraker*, 501 F.3d at 240.

As an initial matter, Defendants argue that Knight's involvement in the "Drye incident," does not constitute protected speech. It is undisputed that although Knight claims to have witnessed David Drye steal beer from a local bar, he never reported this incident. In fact, during his deposition Knight admitted that he never reported Drye's conduct to the Chief of Police, to the Mayor, to any employee or agent of Chalfont Borough, or to anyone

on the Chalfont Borough Council. (Pl.'s Dep. 113, 121.)[17] Because Knight's mere presence at the scene of an alleged theft does not constitute speech, the "Drye incident" cannot form the basis of his First Amendment retaliation claim. *See Fogarty v. Boles*, 121 F.3d 886, 891 (3d Cir. 1997) (concluding that "the absence of speech - in fact, its explicit disclaimer by plaintiff - is fatal to the plaintiff's claim"); *Ambrose v. Twp. of Robinson, Pa.*, 303 F.3d 488, 495 (3d Cir. 2002) ("Plaintiffs in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected, and, therefore, only if there actually was *conduct*.")

Turning to the "Horn complaint," Defendants argue that Knight's report to the Chief of Police regarding a fellow officer's alleged misconduct cannot constitute protected speech because any such report was necessarily made pursuant to his official duties as a police officer. *See Kline v. Valentic*, 283 Fed. Appx. 913, 2008 WL 2435579, at *2 (3d Cir. 2008) (concluding that plaintiff did not speak as a citizen when he "complained up the chain of command and not in any public forum about allegedly false statements made during an investigation into his own conduct as a police officer"); *Skrutski v. Marut*, 288 Fed. Appx. 803, 07-2848, 2008

17. Additionally, Matthew Soncini testified during his deposition that Knight refused to involve himself in Soncini's complaints to Chalfont Borough officials regarding the "Drye incident" because Knight was off duty at the time it occurred. (Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 29, Soncini Dep. 37, 39.)

WL 2787434, at * 3 (3d Cir. 2008) (finding that "none of [Plaintiff's] statements can serve as the predicate for a viable First Amendment retaliation claim" because they were all made "within his direct chain-of-command"); *Lyons v. Mentzer*, No. 08-94, 2008 U.S. Dist. LEXIS 76914, 2008 WL 4444272, at 3-4 (E.D. Pa. Oct. 2, 2008) (finding that Plaintiff's "complaints to superiors, up the chain of command" regarding "fellow officers' misconduct in performing their duties" were made "pursuant to employment responsibilities under *Garcetti*").

Rather than argue that Knight made the "Horn complaint" in his capacity as a private citizen, Plaintiff's counsel contends that a recent Third Circuit decision, *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), "has expanded and really eliminated the question for police officers of whether or not the speech or the conduct is private versus public. *Reilly* says it doesn't matter anymore." (2/19/09 Hr'g Tr. 62:18-21.) After carefully considering the Third Circuit's decision in *Reilly*, as well as the parties' supplemental briefs on this issue, the Court disagrees with Knight's broad interpretation of *Reilly*. (*See* Defs.' Supp. Br., doc. no. 72; Pl.'s Resp. to Defs.' Supp. Br., doc. no. 76.)

The *Reilly* court, applying the Supreme Court's rationale in *Garcetti*, held that a police officer's truthful testimony in court constituted "citizen speech," which fell within the purview of First Amendment protection. *Reilly*, 532 F.3d at 231. In fact, the *Reilly* court explicitly noted that its analysis of "*Garcetti* in the context of this

appeal is limited to the question whether Reilly spoke as a citizen *when he testified at the Munoz trial*." *Id.* at 228 (emphasis added). The *Reilly* court did not, as Plaintiff's counsel contends, expand "the protection of the First Amendment for cops" so that it includes speech made pursuant to an officer's official duties. (2/19/09 Hr'g Tr. 58:14-25; Pl.'s Resp. to Defs.' Supp. Br., doc. no. 76 ("In *Reilly*, our circuit ruled that even actions taken pursuant to an officer's 'official duties' are protected.")) Thus, because Knight's complaint to his superior regarding a fellow officer's alleged misconduct does not constitute "citizen speech" under *Garcetti*, and because the Third Circuit's decision in *Reilly* did not expand the protection of the First Amendment for police officers,[18] the Chalfont Borough Defendants are entitled to summary judgment on Count I of Knight's amended complaint.[19]

18. During oral argument, Plaintiff's counsel made it clear that his First Amendment retaliation claim with respect to the "Horn complaint" hinged on the Court adopting his interpretation of *Reilly*. (2/19/09 Hr'g Tr. 63:3-5.)

19. Although not mentioned in Count I of the amended complaint or in his papers, Knight testified to several other instances of alleged misconduct by Officer Horn during his deposition. For the sake of completeness, these are discussed below.

On August 7, 2002, Knight wrote an "officer in charge report," addressed to the Mayor, in which he reported that Officer Horn "neglected his duties, failed to patrol his beat, and disobeyed a direct order." (Pl.'s Resp. to Defs.' Mot. for Summ. J. Ex. 23.) During his deposition, Knight admitted that

(Cont'd)

Appendix B

Count VIII of the amended complaint raises additional grounds for Knight's First Amendment

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(Cont'd)
this report was written during the "course and scope of [his] duties as a police officer." (Pl.'s Dep. 48.) Thus, under *Garcetti*, this report cannot form the basis of Knight's Section 1983 First Amendment retaliation claim.

Knight testified that in 2004, he complained to Chief Campbell that Officer Horn improperly permitted his friend, Chris Komatic, to remain inside the police station for extended periods of time. (Pl.'s Dep. 50.) According to Knight, he objected to Komatic's presence in the station because he believed that it posed a risk to "the integrity of the evidence in the police station, the integrity of the victims and information on the computer." (*Id.* at 51-52.) Although not addressed in Knight's papers or during oral argument, under the analysis above, it would appear that Knight made this complaint pursuant to his official duty as a police officer.

Knight testified that there was a rumor that Officer Horn played "hide and go seek in the borough with vehicles and Chris Komatic." (Pl.'s Dep. 55.) Knight also testified that he never reported this to anyone because he had "no proof." (*Id.* at 56-57.)

Knight testified that Officer Horn improperly allowed Chris Komatic to observe him making DUI arrests. (Pl.'s Dep. 55.) Knight also testified that he never reported this to anyone because he had "no proof," although he did discuss it with a fellow officer. (*Id.* at 56-57.)

Knight testified that in late 2004 or early 2005, Officer Horn warned two underage boys to leave a party at which there was alcohol, allowing them to avoid arrest. (Pl.'s Dep. 73-74.) Knight also testified that he never reported this to anyone. (*Id.* at 75.)

retaliation claim.[20] However, to the extent that Count VIII of the amended complaint alleges a Section 1983 First Amendment retaliation claim for Knight's "participation in federally protected activities like the 'Watson' investigation", it would fail for the same reasons discussed above. (Compl. P 173, doc. no. 14.) Namely, Knight's complaint to the Chief of Police regarding Officer Horn's alleged interference in the Watson investigation was not protected speech.[21]

To the extent that Count VIII alleges a Section 1983 First Amendment retaliation claim for Knight's "arbitration," it would also fail. (Compl. ¶ 173, doc. no. 14.) It is undisputed that Knight was terminated *before* any demand for arbitration was made. Therefore, his termination could not be in retaliation for "arbitration." (*See* Defs.' Mot. for Summ. J. 31 n.1; 2/19/09 Hr'g Tr. 13:4-12.) Therefore, the Chalfont Borough Defendants are also entitled to summary judgment on Count VIII of Knight's amended complaint.

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20. During a January 3, 2008 motion to dismiss hearing, the Court noted that Count VIII of Knight's amended complaint appears to be a "hybrid" of First Amendment and Equal Protection claims. (1/3/08 Hr'g Tr. 23:9-15.) To the extent that Count VIII alleged an Equal Protection class-of-one claim, that claim was dismissed with prejudice on February 19, 2009. (*See* 2/19/09 order, doc. no. 71.)

21. During his deposition, Knight testified that he did not otherwise participate in the investigation into Watson's drug activities. (Pl.'s Dep. 94.)

IV. CONCLUSION

For these reasons, Defendants' motions for summary judgment shall be granted. An appropriate order will issue.

Appendix B

ORDER

AND NOW, this **13th** day of **March 2009**, upon consideration of Defendants' motions for summary judgment (doc. nos. 50 & 53), and Plaintiff's responses thereto, it is hereby **ORDERED** that Defendants' motions are **GRANTED.**[1]

IT IS FURTHER ORDERED that the case shall be marked **CLOSED.**

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

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1. The Court previously dismissed Counts II, III, V, VI, IX, X, XI, and XII of the amended complaint (*see* 1/4/08 order, doc. no. 36), and Counts IV and VII of the amended complaint, with prejudice (*see* 2/19/09 order, doc. no. 71). The Court also previously dismissed part of Count VIII with prejudice, but only to the extent that it alleged an Equal Protection class-of-one claim. (*Id.*) This order addresses all of Knight's remaining claims, and brings this matter to a close. *See* Appendix A, attached.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 10, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2012

JONATHAN KNIGHT,

Appellant,

v.

DAVID DRYE, In His Individual and His Official Capacity As Chalfont Borough Manager; MARILYN BECKER, In Her Individual and In Her Official Capacity as Mayor Of Chalfont Borough; GARY LUCAS, In His Official Capacity As President Chalfont Borough Council; CHALFONT BOROUGH COUNCIL, In Their Official Capacities As Members of Chalfont Borough Council; CHALFONT BOROUGH; CHIEF POLICE FRANK CAMPBELL, In His Official Capacity As Chief Of Chalfont Borough Police Department; POLICE BENEVOLENT ASSOCIATION, Chalfont Borough Lodge; CHALFONT BOROUGH POLICE DEPARTMENT, Chalfont Borough; FRATERNAL ORDER OF POL LODGE # 53

Appellees.

Appendix C

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, *Circuit Judges* and KANE,* *Chief District Judge*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: May 10, 2010

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* Honorable Yvette Kane, Chief Judge of the United States District Court for the Middle District of Pennsylvania, sitting by designation. Judge Kane's vote is limited to panel rehearing only.

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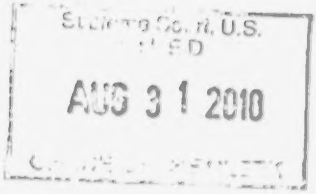

No. 10-169

IN THE

Supreme Court of the United States

JONATHAN KNIGHT,

Petitioner,

v.

DAVID DRYE, *et al*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The question before this Honorable Court is whether Knight engaged in speech that would entitle him to the protection of the First Amendment.

The Appellate Court affirmed the Trial Court's holding that there were no genuine issues of material fact to support Knight's claim that he engaged in protected speech.

Knight was terminated by Chalfont Borough after the Borough learned that he had informed a known drug dealer, Whitney Watson, that Watson was the subject of an undercover narcotics investigation by a multi-agency drug task force. Knight's conduct violated the Borough's civil service rules as well as the police department's policy against disclosing confidential information to the public. Knight was suspended by the Borough while the Office of the District Attorney of Bucks County, Pennsylvania, through a grand jury proceeding, conducted a criminal investigation. After the grand jury indicted Knight on charges of obstructing the administration of law or governmental function and hindering prosecution, the Borough Council voted to terminate Knight's employment.

While Knight was acquitted of the criminal charges following a jury trial, his termination was upheld in an arbitration decision.

In his lawsuit, Knight claimed that the real reason for his discharge is because he allegedly complained about misconduct of a fellow officer and the Borough Manager.

After careful consideration of the evidence of record, the Appellate Court found no genuine issue of material fact concerning whether Knight engaged in protected conduct.

It appears that Knight claims that he engaged in two specific instances of protected conduct by: (1) complaining of alleged misconduct of a fellow officer, Clifford Horn; and (2) observing potential criminal conduct by the Borough Manager at a neighborhood bar while off-duty.[1]

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[1] In proceedings before the Trial Court, Knight offered several additional instances of misconduct that he claimed triggered the First Amendment. Each instance was evaluated by the Trial Court, wherein it found no genuine issue of material fact existed since the record demonstrates that Knight never complained about any of the alleged misconduct. *See* App. 27a-28a at n. 19. Knight did not brief these matters in his appeal to the Appellate Court.

In proceedings before the Appellate Court, and again in his Petition for a Writ of Certiorari, Knight offered that his arbitration and/or grand jury testimony was protected conduct entitled to First Amendment protection. *See* App. 5a at n. 1; Petition at p. 12.

The Appellate Court properly found that (1) Knight's complaint up the chain-of-command is not protected speech under the First Amendment pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and (2) Knight's *observation* of potential criminal conduct of the Borough Manager did not create a viable First Amendment claim since Knight *admitted* that he *never reported* the Manager's conduct to Borough officials.

The Appellate Court also properly held that *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008) did not stand for the proposition that Knight's out-of-court statements to his superiors constituted "citizen speech" that should be precluded from the "official duties" doctrine set forth in *Garcetti*.

COUNTER-STATEMENT OF FACTS

Since Petitioner, Jonathan Knight (hereinafter "Knight"), misrepresented the facts of record in the Statement of the Facts contained in the Petition for a Writ of Certiorari, Respondents, Chalfont Borough, the Chalfont Borough Council, Mayor Marilyn Becker, Police Chief Frank Campbell, and David Drye (collectively the "Chalfont Borough Respondents" or the "Borough") file the instant counter-statement to correct the record.

While Knight claims that in February of 2005, he reported complaints about the conduct of fellow officer, Clifford Horn, received by a citizen, Whitney Watson, who managed his family's car wash located in the Borough, to Chalfont Borough Mayor Marilyn Becker and Chalfont Borough Chief of Police Frank Campbell, this is not supported by the record. The undisputed facts of record, including Knight's own deposition testimony, reveal that Knight reported that Horn improperly issued a traffic citation to an employee of Watson as the conduct giving rise to the citation occurred on private property (a parking lot). Several days later, Knight and a fellow officer, Robert Milligan, informed Chief Campbell that Officer Horn made general inquiries into illegal narcotics activity at Watson's car wash (Milligan and Knight were aware that an undercover narcotics investigation had commenced in the area and Watson

was a target). In response, Chief Campbell informed Knight, Milligan and Horn to stay away from the car wash during the pendency of the narcotics investigation. There is no competent evidence of record that suggests Knight ever reported these incidents to Mayor Becker.

Knight also avers that neither Mayor Becker nor Chief Campbell conducted an investigation into his reports concerning Horn. This is not true. Chief Campbell promptly told all involved to stay away from the car wash during the pendency of the investigation. In addition, the improperly issued traffic citation was withdrawn once it was learned that the conduct occurred on a privately owned parking lot.

Knight also claims that in June 2005, he witnessed the Chalfont Borough Manager, David Drye, steal beer from a local bar. In his Petition, Knight claims that he was identified as a witness and reported this event to the municipal Respondents. However, Knight's sworn deposition testimony reveals that Knight never reported this incident to anyone at the Borough. During his deposition, Knight admitted that he did not call the police, did not prepare a report, did not investigate the incident, and did not inform the Chief of Police, the Mayor, or the Borough Council about the incident. The bar owner who was the victim of the theft, Matthew Soncini, testified that Knight informed him that Knight was off-duty and did not want to get involved. There is no competent evidence of record

that suggests Knight reported this incident to the municipal Respondents.

Knight further avers that the "unrebutted facts" of his Affidavit create a material dispute of fact compelling the denial of summary judgment. This is not true, as Knight's Affidavit, submitted on the date that his response in opposition to summary judgment was filed, attempts to revive his claims, and directly contradicts his sworn deposition testimony. Thus, Knight's Affidavit is not competent evidence that should serve to defeat summary judgment.

Knight also disputes the Trial Court's finding that Knight knew of the undercover investigation into Watson, based upon the facts averred in his Affidavit and in a Reply Brief filed by his counsel in opposition to summary judgment. However, Knight may not escape from his own sworn testimony wherein he admits to informing Watson that he was the subject of an undercover investigation.

In an effort to distort the factual record, Knight cites to a portion of his sworn testimony wherein he told Watson to stop dealing drugs as if this testimony shows that he did not "inform" Watson that he was the subject of the undercover investigation. This alone does not create a material factual dispute as to whether Knight also confirmed to Watson that he was the target of the investigation, as the two statements are not mutually exclusive.

While Knight claims in his Petition that he was not terminated until after his arbitration testimony, this belies the undisputed evidence of record. The undisputed facts of record show that Knight appealed his termination to an arbitrator, who conducted a hearing in accordance with the Borough's collective bargaining agreement with the police. Thus, the hearing held pursuant to an appeal from Knight's discharge was conducted after Knight's discharge. Pursuant to Pennsylvania law, there would have been no arbitration hearing on the merits of Knight's discharge prior to the date of actual discharge.

In the Petition, Knight claims that the Trial Court erred by finding that, based on tips from an undercover informant, an investigation commenced. Knight seems to imply that since the Borough did not initiate the investigation, no investigation occurred. This is patently false as it is undisputed that the District Attorney's Office initiated an investigation before a grand jury upon which the Chief of Police relied in making his recommendation to the Borough Council that Knight be discharged.

Finally, while Knight represents that Mayor Becker and Chief Campbell both testified that they did not rely on the criminal charges as a basis to terminate Knight, thereby implying that since Knight was not ultimately convicted of the criminal charges there is no basis to affirm his discharge, the undisputed evidence actually demonstrates that

Becker and Campbell relied on the underlying criminal *investigation* in recommending discharge. The basis of the recommendation was the investigation (which included sworn testimony of witnesses, including Knight, appearing before the grand jury), which demonstrated that Knight had violated the Borough's civil service rules and department policy (and not because Knight was guilty of a crime).

REASONS FOR DENYING THE PETITION

Knight advances three reasons in support of his Petition for a Writ of Certiorari, none of which constitute a valid basis for granting the Petition. Each purported basis for certiorari is analyzed *seriatim*.

Rule 10 of the Supreme Court sets forth the standard governing the grant of certiorari. It provides that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. *Id*. A petition for a writ of certiorari will be granted only for compelling reasons. *Id*.

While not all-inclusive, Rule 10 provides three bases governing the question of whether to grant certiorari. Each basis is paraphrased hereinbelow.

> **(a)** a conflict between decisions of the United States courts of appeals on an important federal question;

> **(b)** a decision of a state court of last resort that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> **(c)** a state court or a United States court of appeals' decision on an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S.Sup.Ct. Rule 10, 28 U.S.C.A.

"A principal purpose for which we use our certiorari jurisdiction...is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (U.S. 1991). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S.Sup.Ct. Rule 10, 28 U.S.C.A.

A. Knight misapplies the legal authority cited in support of certiorari.

The Appellate Court correctly applied this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

in deciding to affirm summary judgment in favor of the Chalfont Borough Respondents.

Despite the contention of Knight, the holding in *Garcetti* remains sound and undisputed law in that there are no conflicts among the circuits in the application of the holding to police officers.

Knight misapplies the various circuit court decisions upon which he relies for the proposition that the Appellate Court's decision conflicts with *Garcetti*. Upon examination of each decision, it is evident that there is no inconsistency in the Appellate Court's application of the law. For example, Knight relies on *Hope v. Pelzer*, 536 U.S. 730 (2002), a decision that pre-dates *Garcetti*, and involved an Eighth Amendment analysis concerning cruel and unusual punishment, a decision unrelated to the application of *Garcetti*. It is unclear why Knight cites to Hope, as there is no holding in Hope that broadens the First Amendment rights of police officers.

It is equally unclear why Knight relies upon *Behrens v. Pelletier*, 516 U.S. 299 (1996), a decision that did not involve the First Amendment, and predates *Garcetti*, or *Johnson v. Jones*, 515 U.S. 304 (1995), an excessive force claim, also pre-dating *Garcetti*. Neither decision broadens the First Amendment rights of police officers.

Despite Knight's representation that the case at bar conflicts with *Okin v. Village of Cornall on Hudson Police Dept.*, 577 F.3d 415 (2nd Cir. 2009), *Okin*

is a due process and Equal Protection claim that does not mention the First Amendment or *Garcetti*. Likewise, *Demoret v. Zegarelli*, 451 F.3d 140 (2nd Cir. 2006) is a gender discrimination claim brought pursuant to the Equal Protection clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, and state law. *Id.* at 144. The case did not involve the application of the First Amendment or *Garcetti*.

While *Skehan v. Village of Mamaroneck*, 465 F.3d 96 (2nd Cir. 2006) is a First Amendment claim, the Court expressed no view on whether plaintiff's statements were made pursuant to his official duties as a police officer, since no factual record had been developed on that issue. *Id.* at 106. Accordingly, the decision of *Garcetti* was not applied by the Second Circuit and, thus, the decision does not serve to show a conflict among the circuits, as Knight would suggest.

Likewise, while *Munafo v. Metropolitan Transportation Authority*, 285 F.3d 201 (2nd Cir. 2002) involved a First Amendment claim, the Second Circuit declined to render a decision on the question of whether the individual defendants were entitled to qualified immunity on the ground that the Court lacked jurisdiction over the appeal with respect to the First Amendment claims. *Id.* at 211. Accordingly, the Second Circuit never applied a First Amendment analysis in its decision, and did not apply *Garcetti* since the decision pre-dates *Garcetti*.

Munafo does not support Knight's contention that the Appellate Court's decision conflicts with *Garcetti* or other circuit decisions that have considered the scope of the First Amendment.

In *Harman v. City of New York*, 140 F.3d 111 (2nd Cir. 1998), the sole issue before the Court was a First Amendment prior restraint claim filed by employees of a City agency. The question before the Court was whether two press policies, which limited the ability of employees to provide statements to the press, constituted an unconstitutional prior restraint on employee speech in violation of the First Amendment. *Id.* at 114-116. The Second Circuit affirmed summary judgment in favor of plaintiffs holding that the policies represented an unlawful prior restraint. *Id.* at 119, 124. While a First Amendment retaliation claim had initially been filed by a plaintiff employee who had been disciplined for violating the policies by speaking with ABC News, the claim was not considered by the Second Circuit, as it was not one of the issues raised in the cross-motions for partial summary judgment that was subject to the appeal. *Id.* at 117. Accordingly, Knight's reliance on Harman is misplaced as it does not reflect an inconsistent application of *Garcetti* or by any case reported in the Third Circuit.

In *Frank v. Relin*, 1 F.3d 1317 (2nd Cir. 1998), the Second Circuit vacated the district court's decision granting summary judgment in favor of the defendant employer on the basis of qualified immunity in

a First Amendment retaliation claim on the basis that there were questions of fact as to the reasons plaintiff was discharged. *Id.* at 1329. There was no dispute among the parties over whether plaintiff had reported possible wrongdoing. Therefore, Frank does not support Knight's contention that the Appellate Court's decision in the case at bar conflicts with Second Circuit jurisprudence.

Since Knight has failed identify a conflict among the circuit courts or with a decision of this Honorable Court, the Petition should be denied.

B. The Appellate Court decision does not conflict with *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Garcetti holds that the First Amendment does not protect a public employee for statements made while pursuing his official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

With respect to the first of the two instances of allegedly protected conduct advanced by Knight, involving the alleged misconduct of Officer Horn, Knight admitted in his sworn deposition testimony that these complaints were made up the chain of command to his superiors in accordance with his official duties as a police officer.

The Appellate Court properly reasoned that any complaints that Knight made up the chain-of-command to his superiors were properly subject to

his official duties as a police officer and, consequently, Knight was precluded from asserting a First Amendment retaliation claim in light of *Garcetti*. See also *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007). Moreover, Knight admitted in his sworn deposition testimony that he made complaints up the chain of command in accordance with his duties as a police officer. Knight offers no Supreme Court or circuit court decision that contradicts the holding of the Appellate Court in this respect.

With respect to the second instance of allegedly protected conduct advanced by Knight, involving his observation of potential criminal conduct of Borough Manager Drye, Knight admitted in his sworn deposition testimony that he never made a report about the incident. Thus, summary judgment was resolved on the basis of the lack of any factual dispute, and not on the alleged misapplication of *Garcetti*.

To the extent Knight bases his Petition upon the application of the doctrine of qualified immunity, neither the Trial Court nor the Appellate Court based their decisions on the doctrine of qualified immunity.

C. The Appellate Court decision does not conflict with *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008).

Knight misinterprets *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008), whose holding is limited to the First Amendment's protection of sworn testimony presented at trial, concerning the conduct of co-workers. Here, Knight's alleged conduct involved his report of a fellow police officer's alleged misconduct to the Chief of Police.

Reilly held that truthful testimony at trial concerning the misconduct of a fellow police officer falls within the purview of First Amendment protection. *Reilly*, 532 F.3d at 231. This holding arguably creates an exception to the general proposition articulated in *Garcetti* that speech made pursuant to a plaintiff's official duties is not protected under the First Amendment.

In the instant case, the gravamen of Knight's complaint is premised upon his statements (up the chain of command) to Chief Campbell that Officer Horn engaged in misconduct while on duty. Knight does not claim that he ever testified against Horn in court. Accordingly, the holding in *Reilly* does not support Knight's claim here.

Knight also complains that "the lower court simply excluded consideration of the arbitration testimony as a basis for a First Amendment claim." Petition at p. 12. However, the Trial Court did address Knight's arbitration claim, finding that the claim would also fail because it is "undisputed that Knight was terminated before any demand for arbitration was made." See App. 29a.

To the extent Knight claims that *Reilly* holds Knight's grand jury testimony constitutes public speech, it fails on three grounds: (1) this claim was not raised before the Trial Court and, as a result, is waived on appeal, See *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005), (2) Reilly involved the plaintiff police officer's testimony concerning alleged misconduct of other officers (not himself); and (3) the subject matter of Knight's grand jury testimony in defense of criminal charges against himself is clearly personal, and not a matter of public concern, thereby triggering the well-settled law that only matters of public concern, and not personal grievances, are actionable under the First Amendment as protected speech. *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti*, 547 U.S. at 420. Accordingly, the Appellate Court properly rejected Knight's position.

D. The Trial Court did not err in applying all inferences in favor of nonmovant as required by Federal Rule 56.

It is clear from the Appellate Court's decision there were no facts in dispute concerning the question of whether Knight engaged in protected conduct. In support thereof, the Appellate Court relied upon Knight's sworn deposition testimony, wherein he admitted that he never reported the purported misconduct of the Borough Manager to any municipal official.

While Knight attempts to create an appearance of disputed material fact by the submission of a self serving Affidavit that directly contradicts his own sworn deposition testimony, a court is not compelled to accept it as "genuine" for the purpose of defeating summary judgment. See, e.g., *In re CitX Corp., Inc.*, 448 F.3d 672, 679 (3d Cir. 2006) (noting that a "sham affidavit" is one that attempts to "explain away or patch up an earlier deposition in an attempt to create a genuine issue of material fact," and explaining that the "sham affidavit doctrine" generally "refers to the trial courts' practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony") (citation omitted); see also *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007)

("[I]f it is clear that an affidavit is offered solely for the purpose of defeating summary judgment, it is proper for the trial judge to conclude that no reasonable jury could accord that affidavit evidentiary weight and that summary judgment is appropriate."). Accordingly, any alleged "disputed fact" in which Knight relies on his Affidavit to create should be rejected if the fact contained in the Affidavit contradicts his own sworn testimony.

Moreover, while Knight states that the Trial Court ignored the standard governing summary judgment by failing to draw all factual inferences in favor of the Petitioner, Knight fails to identify the specific facts that were not drawn in his favor. The emphasis that Knight places on the Appellate Court's decision that a police officer's reports up the chain of command fall within an officer's official duties is misplaced, as this is a legal determination and not a failure to properly infer facts. In fact, it is not disputed that on one occasion, Knight reported alleged misconduct concerning Officer Horn to his superiors. The conclusion of the Court is based on law, not an interpretation of disputed facts. Likewise, as to the only other alleged report, concerning alleged misconduct of Drye, Knight admits to never making said report. Thus, there is no "inference" for the Trial Court to draw, as no report was ever made.

Likewise, Knight fails to draw a distinction between a "matter of public concern" and whether that concern was raised pursuant to a police officer's offi

cial duty. The Chalfont Borough Respondents do not dispute that bona fide and good faith allegations of police misconduct are matters of public concern. However, the position advanced by the Chalfont Borough Respondents, and adopted by the Appellate Court and Trial Court, is that police officers are duty-bound to report alleged police misconduct to superiors as part of their job.

Likewise, while Knight complains that the Appellate Court failed to address the "un-rebutted facts" that Knight had reported Horn for additional acts of alleged misconduct to Mayor Becker, the Trial Court did address these allegations, finding that these reports were also made pursuant to Knight's official duties (based, in part, on Knight's sworn admissions that the reports were made pursuant to his official duties or that certain other acts of alleged misconduct were never reported). See App. 27a-28a at n. 19. The Appellate Court did not address these "facts" as Knight failed to brief the facts in the Appellate Court proceedings. As such, they are waived.

To the extent Knight faults the Trial Court's citation to grand jury testimony in its opinion on the basis that the grand jury testimony was not cited by the Borough as a basis for Knight's discharge, such a position is nonsensical. The Trial Court cited the grand jury testimony only as a means to develop the factual background of the case, and not as a specific basis for Knight's discharge (as the grand jury testimony did not focus on Knight's discharge but,

rather, the criminal conduct of Knight). Moreover, the Trial Court expressly stated that to the extent there were disputes of fact, it adopted Knight's version of facts. See App. 10a-11a at n. 5.

Knight's further contention the Trial Court's reliance upon sworn grand jury testimony cloak him with First Amendment protection is ridiculous since Knight never raised such a claim before the Trial Court.

Knight concludes his Petition by misconstruing the record by advancing the position that the Trial Court erred by finding that " 'based upon these tips from an undercover informant' an inquiry was begun" on the basis that the finding is unsupported by the record. However, it is Knight's position that is unsupported by the record. The undisputed evidence reveals that the District Attorney commenced the investigation through grand jury proceedings, after an initial investigation by County detectives.

Likewise, while Knight claims that Becker and Campbell "deferred to the criminal process" implying that the end result of the criminal process should carry the day, Becker and Campbell's deferral to the criminal process does not necessarily mean that the basis for terminating Knight's employment was a criminal conviction. In fact, the basis for termination has been consistent from the very beginning, that is, Knight's violation of the Borough's civil service rules and department policy.

CONCLUSION

For the reasons set forth above, the Chalfont Borough, Respondents respectfully request this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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